No. 11,737

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILO W. BEKINS and REED J. BEKINS as Trustees under the Last Will of Martin Bekins, Deceased,

Appellants,

vs.

COMPTON-DELEVAN IRRIGATION DISTRICT,

Appellee.

BRIEF FOR APPELLANTS.

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Subject Index

Table of Authorities Cited

Codes

Texts

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JURISDICTIONAL FACTS AND PLEADINGS.

This cause arose out of a proceeding for composition of debt of the Compton-Delevan Irrigation District, an irrigation district organized under the provisions of "the California Irrigation District Act" of the State of California, approved March 31, 1897, being Stats. 1897, page 254, and acts amendatory thereof. The proceeding was authorized under the provisions of Chapter IX of the bankruptcy Act of 1898 (11 U.S.C.A., Sec. 401-404).

The jurisdiction of this court in this appeal is under Sections 24 and 25 of the Bankruptcy Act of 1898 as amended June 22, 1938.

The petitioner herein (appellee district) filed its petition for confirmation of composition December 13, 1941 (R. 2-16, case No. 10934).[1]

After a hearing upon the plan of composition an interlocutory decree was entered in the District Court (R. 23-31, case No. 10934) on February 24, 1942, and a final decree was entered August 17, 1942 (R. 32-38, case No. 10934).

The present appellants failed to present their bonds for payment within the time limited in the decree and applied to the District Court for an order authorizing payment. This application was denied in the District Court and an appeal taken from the order and this court reversed the order below and issued its Mandate to the District Court (R.2), whereupon the motion to modify the final decree was granted (R.5). The conditions in the order not having been complied with by the appellee, the appellants in this cause applied below for leave to sue upon their original obligation, freed of the composition proceedings. (R.10). The district in reply asked the court below to modify the final decree. This appeal is from the final order of the court below dated July 16, 1947 (R. 50, 51) denying the application of the Bekins

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[1]This appeal is numbered in this court 11,737. A part of the record on appeal is the printed transcript of record on appeal in the former case of *Bekins v. Compton-Delevan Irrigation District*, No. 10,934 in this court (R. 58). An order was obtained from this court providing that the record in the former case No. 10,934 need not be reprinted (R. 60). As it is necessary to refer to the record on appeal in the former appeal No. 10,934, we will when referring to that part of the record add the phrase "case No. 10,934". Otherwise the reference to the record will be in the present appeal, No. 11,737.

Trustees for leave to sue and granting a modification of the final decree. This order was filed July 16, 1947 (R. 51). Notice of appeal was filed August 21, 1947 (R. 52), there being no notice of the entry of the order given.

STATEMENT OF THE CASE.

Throughout this brief the Compton-Delevan Irrigation District will be referred to as the district and appellants will be referred to as the trustees.

The proceeding is under the Municipal Bankruptcy Act of the United States, Title 11 U.S.C.A., Sections 401-404.

At the outset it should be noted that a former appeal was taken in this cause as stated above, the number in this court being 10934 and by order of this court the transcript of record in the former case is not reprinted but is a part of the record on appeal here (R. 60). References to the record in the former case will be distinguished by using the number of that case following the reference to the record (R. 10934) otherwise the references are to the printed record on appeal in the instant appeal No. 11737.

The Compton-Delevan Irrigation District is an irrigation district organized under the laws of the State of California and a public agency. The plan of composition is set forth in the petition for composition (R. 2, case No. 10934). The district had a debt of $384,000 and had borrowed from the Reconstruction

Finance Corporation of the United States the sum of $76,000 (R. 7, case No. 10934), and proposed to pay each of its creditors the sum of $200 per thousand dollar bond without any of the many years' interest. The plan of composition went through without opposition and an interlocutory decree was entered on March 11, 1942 confirming the plan of composition (R. 31, case No. 10934). Shortly thereafter the final decree was entered on August 17, 1942 (R. 38, case No. 10934).

The appellants, the trustees, were the owners of $11,000 par value of bonds of the district and filed their claim in the proceedings January 26, 1942 (R. 23, case No. 10934).

The final decree, which was entered without notice to the appellants, provided a period of 12 months for presenting bonds for payment, otherwise payment would be barred (R. 36, case No. 10934). The appellants through what they claimed was excusable neglect failed to present their bonds within the period provided in the final decree and on August 18, 1944, filed a motion for an order to modify the provisions and terms of the final decree to provide an extension of time for the trustees to present their bonds. This motion was denied by the District Court on September 19, 1944 (R. 64, case No. 10934). From this order an appeal was taken and the decision below was reversed in the case of *Bekins v. Compton-Delevan Irrigation District,* 150 Fed. (2d) 526. After denial of petition for writ of certiorari by the United States Supreme Court (326 U.S. 772, 66 S. Ct. 230)

the mandate of this court went down to the court below and was filed December 12, 1945 (R. 4). This mandate commanded the reversal of the order from which the appeal had been taken and that such further proceedings be had in said cause as would be proper (R. 3). Thereupon the District Court entered an order granting a motion to modify the final decree on January 25, 1946 (R. 6).

The terms of this order are of extreme importance, as the order provided that the final decree be modified to extend the time for deposit of the bonds and providing that the trustees might have thirty days after the entry of such order to present to the Treasurer of the district the eleven bonds with the coupons and that *"upon such presentation and the surrender of said bonds and coupons, the said Compton-Delevan Irrigation District shall pay to the said trustees the sum of $2200.00 upon said bonds and coupons with deductions for missing coupons, if any be missing, as provided in the said final decree and in the interlocutory decree heretofore entered herein, and shall also pay to said trustees the sum of $161.60 costs taxed herein, or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein"* (R. 6).

It is to be observed that counsel for the district disapproved of this form of order (R. 7) and that notice of the lodgement thereof had been properly

given (R. 8). Furthermore, the trustees gave notice of the entry of the order (R. 9).

The record shows (R. 13) that the trustees had the bonds presented to the Treasurer of the Compton-Delevan Irrigation District on March 25, 1946 for surrender and cancellation upon payment of the $2200.00 ($200.00 per $1000 bond and appurtenant coupons) together with $161.60 costs as provided in the order (R. 13), and when payment was refused the bonds and coupons remained on deposit with a bank in Chico, California where the Treasurer's office is located, with instructions to deliver them upon request to the treasurer of the district, until after May 21, 1946 (R. 13) which was beyond the time limit provided for payment in the order (R. 6).

Payment of the amount provided by the plan of composition having been refused by the district, application for leave to sue on the bonds was made to the District Court June 13, 1946 (R. 10, 12). The Trustees took the position that they were freed of the composition proceeding as provided in the court's order because of the failure of the district to make the payment provided by the plan of composition.

The district made an answer to this application by the affidavit of Mr. Peters (R. 15). This answer admitted that the bonds had been presented March 25, 1946 and had not been paid (R. 19) but set up the defense that at the time of the presentation of the bonds the district did not have sufficient funds to pay, and that it was necessary for them to borrow

from the Reconstruction Finance Corporation in order to make payment (R. 20). It further set forth the difficulties of the district in attempting to secure funds to make the payment required, and asked that the court modify the final decree to permit the district to set up the defense that the final decree did not intend to give the Bekins Trustees the right to recover the full face value or to be freed from the composition proceedings (R. 20-25). This affidavit was dated November 13, 1946.

Further affidavits were made by the parties and the application of the trustees for leave to sue and the application of the district for an order modifying the final decree were submitted to the court.

The District Judge filed what was called an Opinion and Order which appears to be a preliminary opinion (R. 34-43). This opinion was dated April 23, 1947 and recited that two matters were submitted to the court: 1. The application of the district for an order interpreting the order made January 25, 1946, and 2. The application for leave to sue by the trustees, and provided that upon determining certain matters the court would make a further order, with conditions to be named in the order (R. 42). Subsequently on June 19, 1947 the District Judge filed its "Findings and Order" (R. 48) wherein it recited that the trustees having filed their application for leave to sue and the district having also filed a motion for interpretation of the court's order modifying the final decree, which order was made and entered January 25, 1946, and that having passed upon the mo-

tions by preliminary order made April 24, 1947, the court finds from the affidavits that the district failed "to accept and pay the composition value of the bonds" of the trustees and as a result of the failure the trustees filed their motion for leave to sue and the district filed its motion for interpretation of the order of January 25, 1946 and ordered: "It Is Hereby Ordered that Compton-Delevan Irrigation District pay into the registry of this Court the sum of $385.00 as and for a reasonable counsel fee and costs which the Court awards to the Bekins Trustees in this matter, and upon said sum being paid, this Court will make its final order denying the trustees leave to sue." (R. 47, 48).

This order appears to be a preliminary and conditional order.

On July 16, 1947, the court entered a final order in which it recites: "It is hereby finally ordered that the petition or application of the Bekins Trustees to sue be and the same is hereby denied", (R. 50-51).

Thereupon the trustees appealed, filing their notice August 21, 1947. No notice of the entry of the last mentioned order was given.

At the outset it should be noted that a former appeal was taken in this cause as stated above, the number in this court being 10934 and by order of this court the transcript of record in the former case is not reprinted but is a part of the record on appeal here (R. 60). References to the record in the former case will be distinguished by using the number of that

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pay to said trustees the sum of $161.60 costs taxed herein, or upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein." (R. 6).

It is to be observed that counsel for the district disapproved of this form of order (R. 7) and that notice of the lodgement thereof had been properly given (R. 8). Furthermore, the trustees gave notice of the entry of the order (R. 9).

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Payment of the amount provided by the plan of composition having been refused by the district, application for leave to sue on the bonds (the principal

subject of this appeal) was made to the District Court June 13, 1946 (R. 10, 12). The Trustees took the position that they were freed of the composition proceeding as provided in the court's order because of the failure of the district to make the payment provided by the plan of composition.

The district made an answer to this application by the affidavit of Mr. Peters (R. 15). This answer admitted that the bonds had been presented March 25, 1946 and had not been paid (R. 19) but set up the defense that at the time of the presentation of the bonds the district did not have sufficient funds to pay, and that it was necessary for them to borrow from the Reconstruction Finance Corporation in order to make payment (R. 20). It further set forth the difficulties of the district in attempting to secure funds to make the payment required, and asked that the court modify the final decree to permit the district to set up the defense that the final decree did not intend to give the Bekins Trustees the right to recover the full face value or to be freed from the composition proceedings (R. 20-25). This affidavit was dated November 13, 1946.

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This order appears to be a preliminary and conditional order.

. On July 16, 1947, the court entered a final order which orders: "It is hereby finally ordered that the petition or application of the Bekins Trustees to sue be and the same is hereby denied", (R. 50-51).

Thereupon the trustees appealed, filing their notice of appeal August 21, 1947. No notice of the entry of the last mentioned order was given.

EVIDENCE.

The evidence aside from the record of the case itself is contained in 1, the application and affidavit of trustees for leave to sue filed October 7, 1946 (R. 14); 2, affidavit by Jerome Peters, counsel for the district, dated November 13, 1946 (R. 25); 3, affidavit of W. Coburn Cook, attorney for trustees, dated January 3, 1947 (R. 66); 4, affidavit of Mr. Peters dated February 4, 1947 (R. 30); 5, closing affidavit by Mr. Cook dated February 19, 1947 (R. 34).

One of the points in dispute was the availability of funds. Mr. Peters in his affidavit states that on August 24, 1943 a report was made by the registrar of the court disclosing that there remained $7040 of the original funds left in the hands of the registrar for payment of bonds (R. 17) and that this money was used to liquidate refunding bonds of the district, except for a small balance of $195.42 which was returned to the district (R. 18). This report was made about the time the Bekins Trustees originally filed their motion to be allowed to receive the composition figure,

which was on July 28, 1943 (R. 18). Mr. Peters further states that to secure funds the district on March 27, 1946 sought to borrow money from the Reconstruction Finance Corporation and on April 4, 1946, the Reconstruction Finance Corporation wrote to the district (R. 20). On May 4, 1946 the district passed a resolution to borrow money from the Reconstruction Finance Corporation.

It will be observed that these later dates are at the time when the trustees had presented their bonds to the treasurer of the district and left the bonds on deposit with the bank for much longer than the thirty days required by the order of the court. However, it nowhere appears in the evidence that the treasurer gave any reason or explanation to the trustees or the bank as to why payment could not be made, and the fact is that no explanation was made. The District Judge stated in his opinion (R. 36) the district, when it did not pay gave as its reason want of requisite funds. It doesn't appear that the Bekins ever received any statement as to the reason for refusal to pay. Without question an arrangement could have been made between the trustees and the district for credit or extension of time or for the acceptance of a warrant. This is shown by the fact that the trustees left the bonds on deposit from March 25, 1946 until May 21, 1946 and in fact sent the bonds back to the bank after they had been returned to the trustees. The correspondence between the R.F.C. and the district shows no substantial effort to get money. The court in *Bekins v. Compton-Delevan Irrigation Dis-*

trict, 150 Fed. (2d) 526 had determined that this money did not belong to the district yet the district had as shown above used this money to pay off other bonds and furthermore it actually had money amounting to several thousand dollars and more than enough to pay Bekins in a bond reserve fund (R. 20). The district contended that it could not use this money or any other money it had because of its contract with the R.F.C., yet it had paid money to the R.F.C. in redemption of bonds which the court said belonged to Bekins. What irrigation act would be involved in taking money out of the reserve fund which belonged to the Reconstruction Finance Corporation or was marked for the Reconstruction Finance Corporation to offset the money it had illegally paid the Reconstruction Finance Corporation belonging to Bekins?

No satisfactory explanation for the failure to pay has been shown. The district could have taken the money out of the bond reserve fund. It could have made an arrangement with Bekins. It could have levied an assessment. It could have issued a warrant. It could have borrowed money on warrant (Water Code Sections 24626-7-8).

> "Warrants payable at a future time or times may be issued in consideration of money loaned to the district for the purchase of any of its outstanding bonds or the refinancing or retiring of any outstanding contract. The annual interest payable on these warrants shall be less than the annual interest on the bonds purchased or contract refi-

nanced or retired with the proceeds of the warrants." *Water Code,* Sec. 24628.

Considerable has been said about the question whether there was a valid board of directors. At page 21 of the Record Mr. Peters states than on June 19, 1946 the Board stated it was resigning and on June 8, 1946 two of the board members did resign and stated also that no landowners reside within the district, and under the law the directors are appointed by the Board of Supervisors in such situations (R. 21).

The point here is merely that if there was no valid board of directors, then how could it make the deposit of $2200 with the court? And that brings up the further question that no explanation is made as to how it could get the $2200 suddenly to deposit with the court at the time of the hearing of the trustees' motion when it could not get it before? The registry docket shows $2200 received from the Compton-Delevan Irrigation District on November 14, 1946 (R. 67), following the filing of the official bonds by the two directors on October 22, 1946 (R. 22).[2] Yet the last we hear as to money from the R.F.C. is that in May, 1946 the R.F.C. suggested a new loan or the promise to use the district's bond reserve fund (R. 20). If the district could put this money up in November, 1946, it could have put it up in March, 1946.

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[2]At R. 28 Mr. Peters says the first meeting of the Board after June 1946 was held November 6, 1946.

The rest of the argument raised by the defense merely relates to the effect of the judge below lopping off from the order of January 26, 1946 certain provisions which had been proposed in the order as set forth at R. 23. This particular aspect of the matter will be discussed later. Something is said about equity. It is not clear how equity has any application in this matter. It does not appear that there was any equity for the Bekins trustees to do. It had always been a case of the district itself failing to do equity. They did not even offer to pay any costs, attorney's fees, interest or damages to the trustees when they asked the court to modify the final decree.

THE COURT'S ORDERS.

There is a little confusion in the entry of the orders. The court made what was called "Opinion and Order" on April 23, 1947 (R. 34, 43) and on June 19, 1947 findings and order were entered (R. 47, 48) and then a final order was entered July 16, 1947 (R. 50, 51). It will be observed that while it is indicated that the court granted the application of the district to amend the final decree there is no actual order setting forth any such amendment or special interpretation. Consequently the trustees appealed from the final order of July 16, 1947 (Notice of Appeal filed August 21, 1947, R. 52), without waiting for the presentation of any amendment or interpretation.

The court's reasoning in the matter is set forth in its opinion commencing at R. 34. The court expresses the opinion that the bankruptcy court has no terms, sits continuously and applies doctrines of equity (R. 38), citing as the principal case *Wayne United Gas Co. v. Owens-Illinois Glass Co., et al.,* 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557 (R. 38). The court also seems inclined to the view that the other provisions of the bankruptcy act govern the municipal bankruptcy act (R. 38), and cites the case of *Poinsette Lumber and Manufacturing Co. v. Drainage No. 7 of Poinsette County, Arkansas, et al.,* 119 Fed. (2d) 270 as authority for the proposition that the resources of a district come within exclusive jurisdiction of the bankruptcy court (R. 39). The entire proceeding the court says should be viewed in the light of equitable principles. The former case of *Bekins v. Compton-Delevan* is referred to. The judge at R. 41 appears to the trustees to say that the words of his predecessors "upon the failure of said Compton-Delevan Irrigation District, petitioner herein, to make such payment upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by the terms of the final decree or the interlocutory decree herein" (R. 41) do not have the meaning which they seem by their own words to impart. The judge says also that the order exceeded the extent of the mandate (R. 42).

Necessarily our argument will be directed to a refutation of the basis of this opinion.

ARGUMENT.

THE COURT ERRED IN ITS OPINION THAT THE APPLICATION OF THE DISTRICT FOR INTERPRETATION OF THE ORDER OF JANUARY 25, 1946 SHOULD BE GRANTED AND ERRED IN MAKING ITS ORDER DENYING THE TRUSTEES LEAVE TO SUE.

It appears to the appellants that the points on appeal can best be discussed under one heading, but the points which have been set forth (R. 52) are each of them maintained and for that purpose are set forth in the appendix (See Appendix). It appears to us that the case of *Bekins v. Compton-Delevan Irrigation District,* 150 Fed. (2d) 526 turned upon the legal point that no notice had been given of the entry of the final decree.

It appears to us that the case of *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* supra, is not in point and that the discussion set forth in *American United Life Ins. Co. v. Haines City, Fla.,* 117 Fed. (2d) 574, takes into consideration, which the *Wayne* case could not, the change in rules and amendment of the bankruptcy act. It appears to us also that *American United Life Ins. Co. v. Haines City, Fla.,* is not to be followed in preference to the decision of this circuit in *Newhouse v. Corcoran Irrigation District,* 114 Fed. (2d) 690. When this court issued its mandate following the former Bekins appeal, the order of January 26, 1946 was made. Due notice of this order was given to the district (R. 9) and the district was quite concerned over it because it specifically objected to the language under discussion (R. 7). The disapproval of counsel asked that there be stricken

from the order modifying the final decree the words "upon such presentation and surrender of said bonds and coupons the said trustees shall no longer be bound by terms of the final decree or interlocutory decree herein" (R. 7).

No appeal was taken from the order within the time allowed by law. No motion of any kind was made when the bonds were presented for payment, and no request for time was made by the trustees nor by the district. It was only when several months later upon the application of trustees for leave to sue that the district asked for modification of the final decree.

The district is barred by the provisions of Rule 60 of Federal Rules of Civil Procedure. The motion came too late. *Wallace v. United States,* 142 Fed. (2d) 240, certiorari denied 65 S. Ct. 37, 323 U. S. 712.

The six months expressly fixed by this rule governing relief against judgment or other proceedings is the outermost limit of a reasonable time fixed by this rule within which the motion must be filed, and motion must be denied unless made before six months after entry of judgment or order. *McGinn v. U. S.,* D. C. Mass. 1922, 2 F.R.D. 562. The California rule is regarded as the original of this rule and the decisions applying in California are instructive determining the meaning of this rule. *Leadwith v. Storkan,* D. C. Nebr. 1942, 2 F.R.D. 539. Before the enactment of these rules the courts did have power to correct errors

in judgment and decrees, but afterwards they are bound by the rules. Idem.

The Court modified the final decree on January 25, 1946, as required by the mandate. From such an order so entered in accordance with the mandate there is *no* appeal. *Tyler Mining Co. v. Last Chance Min. Co.* (CCA 9), 97 Fed. 394.

O'Brien Manual, 3rd Ed., 1941, p. 241: Even where there is an appeal from an order entered after the Mandate the second appeal cannot bring up any of the questions which were before the court before. *Republican Min. Co. v. Tyler Min. Co.* (CCA 9), 79 F. 733; *Mathews v. Columbia Nat. Bank of Tacoma et al.* (CCA 9), 100 F. 393; *Olsen v. North Pacific Lumber Co.* (CCA 9), 119 F. 77.

In the case of *Berry v. Root,* 148 Fed. (2d) 945, the Circuit Court of the 5th Circuit, in a municipal bankruptcy proceeding, held that while a court of bankruptcy often applies equitable principles, and may sometimes entertain a controversy in equity arising out of bankruptcy, in which it will follow precedents and practice of courts of equity, yet as respects original bankruptcy proceedings it is not a court of equity but a statutory court created by the bankruptcy act and governed by it.

Therefore, the bankruptcy court cannot change the terms of the statute but must apply the terms of the statute.

There is no question of giving preference or priority to the trustees. The use of that word is entirely

a misnomer. What has happened in this case is that other creditors either accepted the plan of composition and turned in their bonds or became bound by it and turned in their bonds. Here the trustees sought to obtain the benefits of the plan of composition and to turn in their bonds but were refused payment, even after the Circuit Court of Appeals in the appeal from the previous order had ruled that the moneys involved belonged to the creditors and not to the district and therefore the creditors could participate. Even then the Compton-Delevan Irrigation District refused to pay the money over to the trustees, and it will be observed also that the trustees even gave an extension of time on the deposit of their bonds and would have accepted the money even after the expiration of that time, but waited until it became entirely apparent that no payment was to be made. It is our belief that the idea of the Compton-Delevan Irrigation District and its officials was to continue to refuse to make the payment and to harass and annoy those creditors because they had been bold enough to take an appeal and to prosecute their appeal to the Circuit Court of Appeals. That was some sort of punishment which the district was going to inflict upon them. The district did not come in and make any explanation of this course of conduct. The district officers have not been fair, they have not done equity, they come into court with the dirtiest of hands. Now, at last, when they saw the possibility of something happening to prevent the continuance of their punishment and annoyance of the trustees did they at-

tempt to say at long last they have the money and they wish to pay.

There is no seeking of priority or preference. The bonds upon which this claim is based represent good and full value. They were purchased by the Bekins heirs (trustees) at close to a thousand dollars a bond. No interest has been paid upon them for years. We might suggest, too, that if these bankruptcy proceedings had been inaugurated during the present good era of prices the bankruptcy would never have been annulled. The district and its landowners have made hundreds of thousands of dollars out of the repudiation of this debt. The trustees will receive no preference and no priority. They will merely be paid what is due them if they can get it.

There was a specific reason why the Congress placed a limitation and restriction upon the power of the bankruptcy court with respect to the composition proceeding. There had been a long and sustained attack upon the constitutionality of the municipal bankruptcy act, and the United States Supreme Court had held the first municipal bankruptcy act unconstitutional in the case of *Ashton v. Cameron County,* 298 U.S. 513, 56 S. Ct. 892. Only after a new statute was passed and the personnel of the Supreme Court had changed did that court hold the new municipal bankruptcy act constitutional in *U.S. v. Bekins,* 304 U.S. 27, 58 S. Ct. 811 (the same Bekins). One of the strongest arguments in the cases that went to the United States Supreme Court on constitutionality was that an irrigation district was an agency and in fact

branch or arm of the state government, and that it could not be subjected to bankruptcy. The court however held that it had jurisdiction over contracts and over creditors and that if a state agency with the consent of the state entered into a contract with its creditors, the bankruptcy court could compel the acceptance of the terms of the composition by the creditors, although it could not compel the acceptance of the terms of the contract by the state agency. Consequently we find in the statute the provision in Title 11, Sec. 403 (f):

> "If an interlocutory decree confirming the plan is entered as provided in Subdivision (e) of this section, the plan and said decree of confirmation shall become and be binding upon all creditors affected by the plan, if within the time prescribed in the interlocutory decree, or such additional time as the judge may allow, the money, securities, or other consideration to be delivered to the creditors under the terms of the plan, shall have been deposited with the court or such disbursing agent as the court may appoint or shall otherwise be made available for the creditors."

In other words, the provision of the statute is that *if* the district shall make the consideration available within the time prescribed by the court, or such additional time as the court may allow, then it shall be binding upon the creditors. Otherwise they are not bound. Now in this instance the court below, after more than careful consideration, induced we would suggest by the fact that the case itself had already gone to the Circuit Court of Appeals (*Bekins v.*

Compton-Delevan Irrigation District, 150 Fed. (2d) 526), and was back upon reversal, and under the provisions of the mandate, and after the specific objection of the district to the very provisions which it now seeks again to have changed, made a direct positive order of limitation of time as provided in the statute. And the Court recited in the order a thing which the section itself provided, that the plan of composition should be binding upon the creditors only if the debtor made the consideration available within the time prescribed in the decree. We submit that the order made by the court placing a limitation upon the time within which the Compton-Delevan Irrigation District was to put the money up was proper, lawful and in accordance with the intent of the statute itself. We maintain also that that time could not be extended after it had elapsed. It is the general concept of the law that the time within which something may be done, even if it can be extended while the time is still running, cannot be extended after it has run.

It cannot be argued that Judge Welsh did not intend that the provision "upon failure * * * of said District * * * to make such payment * * *, the said trustees shall no longer be bound by the terms of the final decree or interlocutory decree herein," should be in the order from the fact that he cut off from the tail end of the proposed order the provisions reading: "And the provisions of said decrees restraining them from pursuing their ordinary remedies upon said bonds in the state or federal courts shall

be vacated and set aside and permission is granted to said trustees to take proceedings for the collection of said bonds in full and enforcement of their rights thereon free from the restraint of the interlocutory and final decrees of this court in these proceedings."

The judge's intention can be read from what he did. He was not going to write into the order at that time, although we thought that he should, a provision stating exactly what we would be entitled to do if the debtor failed to put the money up within the time allowed, but he did specifically put a provision into his order that the trustees should be relieved from the binding effect of the bankruptcy proceeding if the money was not paid within the time provided by the court.

The judgment of the court cannot be modified by extrinsic evidence. *American National Bank and Trust Co. of Chicago v. U. S.,* 142 Fed. (2d) 571.

It is our position that the order was *res judicata* and could not be set aside or amended when the application was made. *Chicot County Drainage District v. Baxter State Bank,* 60 S. Ct. 317, 308 U. S. 371. The cited case was one which was far reaching, for it involved a proceeding under the bankruptcy act which had been declared unconstitutional subsequent to the date of the entry of the interlocutory decree. The creditors came back and maintained that since the act was unconstitutional the decree should be set aside. The court held that the time for appeal had gone by and it was too late to raise any question of constitutionality; that even if the law were unconstitutional

the judgment had been entered and would have to stand.

Now it cannot be said in the instant case that the Compton-Delevan Irrigation District knew nothing about the order that had been entered or that its procedural rights were in any way infringed or that it did not have an opportunity, full and complete, to protect itself. Notice of the entry of the order was served upon the district and the judge had already advised counsel exactly what he intended to do about the objections. The district should not have been permitted at the late date to come in when it did not make any showing of excusable neglect or anything of that sort or in any way come within the provisions of Rule 60 of Federal Rules of Civil Procedure providing for setting aside an order or judgment within the six months' period.

It is quite obvious that the time for appeal had expired. The order in question was entered on January 25, 1946 and the time for taking the appeal expired within thirty days after the notice was given. (See *Dupont v. Okeechobee County, Fla.,* 135 Fed. (2d) 577, certiorari denied 64 S. Ct. 66, 320 U. S. 751; *Jordan v. Palo Verde Irrigation District,* 105 Fed. (2d) 601.) Thereupon the order became final.

It may be that the creditor could have come in within a six months' period and claimed some relief under the provisions of Rule 60 supra, but the time within which it should do that had expired, and no showing has been made of any neglect, inadvertence, nor is any other fact set forth why it should be per-

mitted to make this attack upon the order. All that it asks in fact is an amendment of the order. The order in question is now a part of the final decree.

The striking from the proposed order of the words above referred to only strengthens the position that the judge considered the matter and did not intend to strike out the provisions that the district now complains of.

We refer again to the provision of the statute which itself says that if the money is not put up within the time required that the creditor is not bound by the bankruptcy decree.

It will be observed that the decree or order made in a municipal bankruptcy proceeding must be careful not to interfere with the governmental or political affairs of the district (*U. S. v. Bekins,* supra). It is for that reason that it is not possible for the federal court to say flatly in a municipal bankruptcy proceeding that the district shall pay the money. It can only say that the district shall pay the money within a certain time or it shall not be discharged from the debt involved.

After a mandate has come down and a judgment or order has been made pursuant to the mandate, the only remedy that we know of which can help the injured party if the order or judgment entered does not happen to be in accordance with the mandate, is to take a new appeal from such an order or judgment (as in *State of Texas v. Tabasco Consolidated School District,* 142 Fed. (2d) 58; O'Brien Manual of Federal Appellate Procedure, supra, page 241).

This district compelled its creditors to accept $200 on each $1000 plus years of unpaid interest. If one creditor perchance recovers more, no great harm is going to happen. We do not refer to these facts as any reason why our position should be sustained, but refer to them merely because we do not wish the court to be under the impression that any calamity of any kind whatever is going to occur if these creditors receive payment in full. In fact one might suppose that those who did get their money have probably done pretty well on it during this period of time, whereas these creditors not only have not received their money but are not even offered any compensation for the delay.

We reiterate, we do not think the case of *Wayne United Gas Co. v. Owens,* 300 U. S. 131 applies here whatsoever. That case was decided before the effect of Rule 60 of Federal Rules of Civil Procedure was realized or determined. We refer to the case of *Norris v. Camp, City Treasurer,* 144 Fed. (2d) 1 for a discussion of this matter. This case was decided October 9, 1944. In it the court says that prior to the effective date of General Order No. 37 (11 U.S.C. following Section 53) a court of bankruptcy had the power to revise its judgment on reasonable application, but declared that General Order No. 37 made the Rules of Civil Procedure apply to bankruptcy procedure, and then quotes Rule 60(b) and the court states that the six months' period having expired the lower court had no power to modify its order and final judgment.

CONCLUSION.

Wherefore, we respectfully represent that the order below should be reversed with directions to grant the trustees leave to sue.

Dated, Turlock, California,
January 5, 1948.

Respectfully submitted,
W. COBURN COOK,
Attorney for Appellants.

(Appendix Follows.)

Appendix.

Appendix

STATEMENT OF POINTS AND ASSIGNMENT OF ERRORS ON APPEAL.

The appellants, Milo W. Bekins and Reed J. Bekins as trustees under the last will and testament of Martin Bekins, Deceased, make the following assignment of errors which they aver occurred in the determination of this proceeding and in the rendering of the decrees appealed from, and state that the points on which they intend to rely on the appeal of this cause are the following:

1. The court erred in denying the application of the Bekins trustees for leave to sue upon the bonds held by the trustees.

2. The court erred in granting the application of the Compton-Delevan Irrigation District for an order interpreting the order of the court made January 25, 1946.

3. The court erred in holding that it had continuing jurisdiction in the matter of the bankruptcy plan.

4. The court erred in holding that the Rules of Civil Procedure for Federal Courts do not restrict the continuing jurisdiction of the court.

5. The District Court did not have power to change or modify the order of January 25, 1946, made pursuant to the mandate of the Circuit Court of Appeals in the prior appeal after the expiration of the time provided in the Rules of Civil Procedure.

6. The court was without power to interpret the order of January 25, 1946, after the expiration of the

time provided in Rule 60 of the Rules of Civil Procedure in such a manner as to nullify the effect of the order.

7. The evidence was insufficient to sustain the finding of the District Court that the Compton-Delevan Irrigation District could not have paid the amount due the trustees prior to the time when the moneys were deposited with the registry of the court.

8. The court erred in determining and holding in effect that until moneys were borrowed from the Reconstruction Finance Corporation the Compton-Delevan Irrigation District could not otherwise furnish the moneys due the trustees.

9. The court erred in determining in effect that equitable reasons were evidenced and shown as a foundation for the court's order.

10. The court was in error in determining and holding that it had exclusive or any jurisdiction of the resources of the debtor.

11. The court erred in not applying the provisions of the Municipal Bankruptcy Act which provide that upon the failure of the debtor to furnish the consideration for the composition the creditor is no longer bound by the plan.

12. The court erred in determining and holding that there were no officers of the district who could act to provide the moneys due the trustees prior to the hearing in this matter.

Dated, September 4, 1946.

W. Coburn Cook,
Attorney for Appellants.